



Fiduciary Breach: Avoidance and Mitigation

Workshop 21
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10:15-11:30 am

presented by

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Agenda

- Who's a fiduciary?
- What are the duties?
- What can a fiduciary be held liable for?
- What's all this about a new reg?
- Case studies



Who's a Fiduciary?

- Persons named in the plan
 - ❖ Plan Administrator
 - ❖ Trustees
- Persons who:
 - ❖ Exercise discretionary authority or control respecting the management of the plan or exercise any authority or control concerning the management or disposition of assets. ERISA §3(21)(A)(i)



Who's a Fiduciary?

- ❖ Provide investment advice for a fee. ERISA §3(21)(A)(ii)
- ❖ Have discretionary authority or responsibility in the administration of the plan. ERISA §3(21)(A)(iii)



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What are the Duties?

- Exclusive Purpose Rule (ERISA §404(a)(1)(A))
 - ❖ Fiduciary must discharge their duties with the exclusive purpose of providing benefits to participants and beneficiaries
 - ❖ Exception for the use of plan assets to pay reasonable expenses relating to the plan's operation and administration



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What are the Duties?

- Prudent Man Rule (ERISA§404(a)(1)(B))
 - ❖ Must act with the care, skill, prudence and diligence under the circumstance that a prudent man acting in a like capacity would act.
 - ❖ Based upon how a person with experience and knowledge would act.
 - ❖ If lacking the expertise, expert help must be obtained



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What are the Duties?

- Diversification (ERISA §404(a)(1)(C))
 - ❖ Must diversify investments to minimize the risk of loss.
 - ❖ Exception for the situation where it would be prudent not to diversify.
 - ❖ Exception for eligible individual account plans holding employer securities (ESOPs and other plans holding qualified employer securities).



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What are the Duties?

- Plan Document Rule (ERISA §404(a)(1)(D))
 - ❖ Must act in accordance with the plan's governance document (i.e. plan document, trust, investment policy statement, etc.)
 - ❖ Exception where plan is inconsistent with ERISA generally.



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What are the Duties?

- Not to Engage in Prohibited Transactions (ERISA §406)
 - ❖ Transactions with participants
 - ❖ Transactions with fiduciaries
 - ❖ Transactions with other related parties (parties in interest)



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What Can a Fiduciary Be Held Liable For?

- Fiduciary is personally liable for their breaches (ERISA §409)
 - ❖ The fiduciary must make the plan whole for losses.
 - ❖ Restore to the plan any profits they made through the use of plan assets.



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What Can a Fiduciary Be Held Liable For?

- Fiduciary is also responsible for a breach by another fiduciary under certain circumstances (ERISA §405)
 - ❖ Knowingly participated or concealed breach. ERISA §405(a)(1)
 - ❖ Enabling the breach to occur. ERISA §405(a)(2)
 - ❖ No reasonable steps taken to remedy the situation. ERISA §405(a)(3)



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What New Reg?

- A fiduciary includes anyone who gives “investment advice” for compensation (ERISA §3(21)(A)(ii))
 - ❖ “investment advice” is not defined in ERISA, only a reg adopted in 1975 – 2510.3-21(c)
- DOL proposes to modify the definition
 - ❖ Lots of opposition and comments
 - ❖ *Will* be adopted – probably 1st quarter 2016
 - ❖ “Applicability date” will be 8 months later....before the new administration takes over in January 2017



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What New Reg?

- “investment advice” will include advice *to* a plan, plan fiduciary, participant, IRA or IRA owner that constitutes
 - ❖ A “recommendation” re: buying, selling or holding assets
 - ❖ A “recommendation” re: investment of assets to be *rolled over* or otherwise *distributed from a plan or an IRA*
 - ❖ Recommendation as to management of property to be rolled over or otherwise distribution from a plan or IRA



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What New Reg?

- ❖ “Certain” appraisals
- ❖ Recommendation of a person who is going to receive a fee for providing any of these types of advice
 - ✓ So acting as a “solicitor” makes you a fiduciary
 - ✓ And recommending an investment manager does too



What New Reg?

- “Recommendation” is a defined term
 - ❖ Means a communication that would reasonably be viewed as a *suggestion* that the recipient engage in or refrain from taking a course of action
 - ❖ The communication must be specifically directed to a recipient for *consideration* in making an investment or management decision
- So you are giving fiduciary investment advice if you direct a suggestion to somebody for them to consider



What New Reg?

- Various “carve outs”
 - ❖ “seller”
 - ❖ Platform but only for participant-directed plans
 - ❖ Selecting and monitoring assistance to participant-directed plans
 - ❖ Education – but you can’t identify specific securities
- Exemptions
 - ❖ BICE
 - ❖ 84-24



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What New Reg?

- Impact
 - ❖ Biggest on broker-dealers
 - ❖ Some on producing tpas
 - ❖ Not much on recordkeepers or RIAs
 - ❖ Rollovers



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Case Study #1

- Who are the fiduciaries?
 - ❖ Walter
 - ❖ Harry
 - ❖ Mary
 - ❖ Green
 - ❖ Taylor
 - ❖ Black
 - ❖ Acme or Jordan
 - ❖ Nash
 - ❖ Justice



Case Study #1

- What fiduciary breaches may have occurred and who may be liable?
- Were there any prohibited transactions? By whom?
- What could have been done to protect the participants and non-breaching fiduciaries?



Case Study #2

- Who are the fiduciaries?
 - ❖ Smith, Jones, and Clark
 - ❖ Bock
 - ❖ Board of Directors
 - ❖ Harris
 - ❖ CPA White
 - ❖ Campbell



Case Study #2

- What fiduciary breaches may have occurred and who may be liable?
- Were there any prohibited transactions? By whom?
- What could have been done to protect the participants and non-breaching fiduciaries?

